Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1783

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK ASTA, et al.,

Petitioners,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

I. Since this case was dismissed prior to there being any contested factual hearings, there are a number of factual issues which are in contest. The best example of such an issue is Petitioners' contention that they were in compliance with OSHA standards and regulations. Respondent denies this contention. It is submitted, therefore, that the facts in this case have not been sufficiently developed at this time to merit review by this Court.

II. The cases which Petitioners contend raise irreconcilable conflicts between the States on the issue of federal pre-emption of state criminal prosecutions are, in fact, neither necessarily irreconcilable, nor in absolute conflict. In fact, all the cases relied upon by Petitioners are factually distinguishable, almost all were decided in reliance upon a subsequently reversed appellate opinion in the case below, and several are actually consistent in principal with the holding of the Illinois supreme court in the case below. Moreover, since no state court of last resort, except the Illinois supreme court, has decided whether OSHA pre-empts such criminal prosecutions, it is submitted that further development by the States in this area would be appropriate before this issue is reviewed. Respondent suggests that, in fact, it is probable that no conflict will be found to exist once this issue is decided by the supreme courts of the various states where it is pending.

III. It is not clear from the factual record in this case that all of the substances involved in the charges implicate OSHA standards, nor does it affirmatively appear that OSHA standards specifically apply to absorption through the skin of all of the substances involved in this prosecution. The facts in this case should, therefore, be more fully developed before review by this Court is entertained.

IV. The instant prosecutions involve the exercise by the State of Illinois of its historic police power to punish, as a matter of retributive justice, crimes which occur within its borders, no matter in what setting those crimes may take place. Congress, in enacting the Occupational Safety and Health Act, intended primarily to create safe and healthful working conditions for the workers of America, and to further that objective, established a system whereby certain national minimum standards would be established, below which employers could not fall. Congress did

not expressly pre-empt the States from prosecuting persons who commit crimes in the workplace, nor did it intend to immunize employers as a class from criminal prosecution for the criminally motivated death or injury of their employees. Evidence of Congressional intent not to preempt may be found in the language and structure of the Occupational Safety and Health Act itself, most specifically in its statement of purpose, its broad savings clause, its reservation of power to the States, and in its enactment of misdemeanor criminal penalties to punish only *standard* violations, rather than substantive offenses such as Murder, Aggravated Battery, and Conspiracy. State prosecutions, such as that in the case below, do not conflict with the purpose of OSHA, nor do they in any way obstruct its application. Therefore, such prosecutions cannot have been intended by Congress to be pre-empted.

ARGUMENT

In making this response to the arguments of Petitioners for a grant of Certiorari, Respondents in no way dispute or diminish the importance of the question of whether or not the States, in the exercise of their historic police powers, are to be permitted to continue the prosecution of criminal offenders in the work setting. Certainly, the question of whether the Occupational Safety and Health Act, in conjunction with Article VI, Clause 2 of the Constitution of the United States, should be read to preempt, and thereby to immunize, an entire class of persons from

such prosecutions is an important issue.[1] Certiorari ought not to be denied, therefore, because the question is unimportant, but for a number of other reasons, which include: (1) the presently undeveloped and unclear factual posture of this lawsuit; (2) the lack of opportunity for courts of last resort in the several states to develop and decide precedent in this area; (3) the clear inapplicability of the Occupational Safety and Health Act to a large proportion of the underlying case; and (4) the correctness of the decision of the Supreme Court of Illinois and the relative clarity of the issues and statutes involved.

I.

THIS CASE, HAVING BEEN DISMISSED PRIOR TO ANY FACTUAL HEARING ON ITS MERITS, IS INSUFFICIENTLY DEVELOPED FOR CONSIDERATION BY THIS COURT AT THIS TIME.

No contested factual hearings were ever had in this case. The Indictments and Informations which charged Petitioners with Aggravated Battery, Reckless Conduct, and Conspiracy against some 42 victims were dismissed, as pre-empted by OSHA and the Supremacy Clause of the Constitution of the United States, prior to any trial on the merits.

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[1] Although Petitioners now argue the importance of the preemption question and bluntly state that the issue is "a recurring one which ultimately will have to be resolved by this Court," (e.g., Petition p. 21) such was not always the case. In their Response to the State's Petition For Leave To Appeal to the Supreme Court of Illinois, Petitioners in this Court took the implicit position that the issues in this case presented no questions of "general importance." (Response to Petition For Leave To Appeal, pp. 2-3, and n. 1) Nevertheless, Respondents agree that the questions were then, and are now, important.

Therefore, although this case may or may not be "ripe" in a strictly technical sense, Respondent submits that it is insufficiently developed as a matter of discretionary review, for consideration by this Court at this time.

A prime example of why this is so may be found in the conflict between Petitioners' assertions that they are being prosecuted despite being in compliance with OSHA standards, (See Petition, pp. 18 and 21) and Respondent's contention that, whether or not Petitioners had ever been cited by OSHA for standard violations, they were, in fact, in violation of those standards.[2]

Respondent respectfully suggests that it is impossible, at this stage of these proceedings, to determine the validity of invalidity of Petitioner's factual arguments, and that since their assertions are contested by Respondent, it would be inappropriate at this time to assume their truth.

Accordingly, Respondent submits that this matter is not ripe, in the practical sense, for consideration by this Court at this time. Respondent therefore respectfully urges for

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[2] Respondent reiterates that this prosecution is based upon the historic right of the States to exercise their police power to punish crimes committed within their respective jurisdictions as a matter of retributive justice. This is not, nor has it ever been, an attempt to set or enforce OSHA standards. Accordingly, since this is not an enforcement action, no standard violations were alleged. Violative conduct, as will be seen, although not material, may be highly relevant to the material issue of Petitioners' mental states. (See footnote 27, *infra*.) Evidence of compliance or non-compliance with OSHA Standards may be introduced on this issue by either side, and a factual determination, followed by a legal conclusion, made on this and the other evidence. Respondent respectfully submits, however, that Petitioners ought to not expect this Honorable Court to make those factual determinations. Rather, the case should first be litigated to determine the validity or invalidity of Petitioners' contentions, and whether or not they are germane.

any or all of the foregoing reasons, that Certiorari be denied.

II.

THE FEW CASES WHICH HAVE ARISEN IN THIS AREA, MOST OF WHICH HAVE NOT YET REACHED THE COURTS OF LAST RESORT IN THEIR RESPECTIVE JURISDICTIONS, ARE BOTH FACTUALLY DISTINGUISHABLE, AND AT THE SAME TIME, NOT ALL IRRECONCILABLY INCONSISTENT IN PRINCIPAL FROM THE DECISION OF THE COURT BELOW. TIME IS NEEDED FOR FURTHER DEVELOPMENT OF THE LAW IN THIS AREA BY THE SEVERAL STATES.

Petitioners take the position that certiorari ought to be granted because the holding of the Supreme Court of Illinois in this case is inconsistent with opinions in other jurisdictions. (Petition p. 19) Petitioners then cite some of these cases to support their argument.

Respondent maintains, however, that the cases relied upon by Petitioners are either distinguishable, not all that different from the decision of the Illinois high court in principal, have not yet reached the court of last resort in the state where the issue is being litigated, or were overly dependent upon the Illinois appellate court's erroneous, and since reversed, decision in the case below.

Respondent will deal with each of these cases *seriatim*.

Petitioners rely upon *Sabine Consolidated, Inc. v. Texas*, 756 S.W. 2d 865 (Texas App., 1988), a case in which the State of Texas, based its prosecution for negligent homicide upon the "general duty clause" of a state occupational safety and health statute. It is unclear from the opinion whether or not the State of Texas ever obtained approval for its health and safety statute, but presuming that it did not have an approved plan at the

time the prosecutions were brought,[3] the safety statute upon which the prosecution was based was itself pre-empted. Subsequent dictum of the Texas Court notwithstanding, Respondent submits that had the Illinois prosecutions at bar been based upon a similar Illinois statute, the result in the Illinois supreme court in this case might have been the same as it was in *Sabine*.[4] In this particular respect, *Sabine* is not only factually distinguishable from, but is not necessarily all that different in principal from the opinion below. Finally, the Court in *Sabine* bottomed its opinion upon the Illinois appellate court's subsequently reversed opinion in the instant case, so its precedental value is questionable.

Petitioners further cite *Colorado v. Kelran Construction, Inc.*, 13 OSHC 1898 (Dist. Ct. Colo. Oct. 6, 1988), a Colorado trial court opinion which not only placed heavy reliance upon the appellate court opinion below, but which

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[3] According to 29 C.F.R. §1902.4(c)(xi), at the time of the Texas prosecutions twenty-one states, one territory and one commonwealth had obtained federal approval for plans they had enacted. These jurisdictions were: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington and Wyoming. Texas apparently did *not* have an approved plan.

[4] Petitioners, in fact, relied heavily upon the case of *Stanislawski v. Industrial Commission*, 99 Ill. 2d 36, 457, N.E. 2d 399, 75 Ill. Dec. 405 (1983), in both the Illinois appellate court and the Illinois supreme court. *Stanislawski*, held that the old Illinois Health and Safety Act, under which Stanislawski sought to recover additional worker's compensation benefits, had been preempted by OSHA. Although the appellate court's opinion mentioned *Stanislawski*, the supreme court's opinion does not, due primarily to its successful distinguishment and its facial inapplicability. (the instant prosecution is not based upon the pre-empted standards contained in an old act.) Texas apparently *did* base its prosecution upon standards contained in a pre-empted act.

seemed to seek guidance from the then as yet undecided Illinois supreme court.[5] Respondent is somewhat surprised that Petitioners would rely on this case, since it appears that it would have been decided differently if the Colorado judge had waited for the opinion he was seeking. The case is also distinguishable because the State stipulated in *Kelran* that the conduct of the defendant, as well as the cause of death of the victims, were controlled by OSHA. This is not true in the instant case.

Thornock v. State, 745 P.2d 324 (Mont., 1987), was an action against the State of Montana by an injured worker for recovery in addition to worker's compensation benefits. Thornock premised his claim, as did Stanislawski in Illinois,[6] upon an old safety law, since preempted by OSHA. Respondent suggests that had this same suit been brought in Illinois, the result would have been the same under *Stanislawski v. Industrial Commission.*[7]

Finally, Petitioners cite *People v. Hegedus*, 169 Mich. App. 62, 425 N.W. 2d 729 (1988), leave to appeal granted in 429 N.W. 2d 593 (Mich. 1988) a non-unanimous decision by a Michigan appellate court which for Respondent, represents a prophecy fulfilled.

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[5] The Colorado judge noted, on page 8 of his slip opinion: "The Court has recently inquired of the Illinois (s)upreme (c)ourt because the court is aware that the decision of the Illinois Court of Appeals (sic) has been appealed to it. The docket number in the Illinois Supreme Court is 65588 and oral argument was heard on March 23, 1988. A decision may be rendered as soon as October 20, 1988 (in fact, decision was rendered February 2, 1989) but may also be somewhat later than that. In any event, there is no decision by that Supreme Court or the highest court in any of the states mentioned."

[6] See footnote 4, *id.*

[7] See footnote 4, *id.*, 99 Ill. 2d 36, 457 N.E. 2d 399, 75 Ill. Dec. 405 (1983).

In the courts below Petitioners explicitly argued that the state would be permitted to conduct prosecutions, such as that at bar, if they obtained approval for a plan from the Secretary of Labor. They implicitly make the same argument here. (See, Petition, pp. 6, 14) Respondents pointed out that the implications of Petitioner's arguments were frightening, for according to the position taken by Petitioners, a prerequisite to criminal justice for persons who work for a living will be the adoption and approval by their State, of a state safety plan, which the State must take to Washington for presentment to the Secretary of Labor (a non-elected official) for approval. If the plan is approved, the state must then create a huge bureaucracy with its attendant added expense to the taxpayers (who are already paying for OSHA), and it must share its authority with the federal government for a period of three years, after which, it may assume full responsibility for health and safety, and presumably, also for the enforcement of its own criminal laws.[8]

Respondent also made the following argument:

> Woe be unto the state which fails to dot every "i" and to cross every "t" under Defendants' theory of preemption, for states which do not include every conceivable crime in the "plan" will not be permitted to prosecute them. Under the approach advocated by the defendants to the Constitution, state and local legislators would have to appear regularly before the Secretary of Labor, hat in hand, every time local

[8] Space limitations prohibit exploration of all of the ramifications of §667 of OSHA if held to apply to state criminal laws of general application, but one such issue is whether Congress has the Constitutional Authority to delegate the power of discretionary preemption to the unelected head of an administrative agency, to preempt local criminal laws or their enforcement.

> needs dictated the necessity for new or modified criminal legislation which might have some impact upon the workplace. The unelected secretary would then pass upon which criminal laws local prosecutors could enforce, and which they could not. The absurdity of this situation is exceeded only by its corrosive effect upon our federal system and the constitutional rights of the several states to exist in our federal union as partners, junior though they may be, with the national authority. . . . The offensive cast of the defendants' preemption theory, seen in the glaring light of its ultimate consequences, carries with it its own conclusion. Defendants preemption theory must be rejected, and the People must be permitted to proceed against them in criminal court. (Reply Br., Supreme Court of Illinois, pp. 21-22)

The reason Respondent's have taken the admittedly unusual step of quoting from their own brief in the court below is to illustrate, in light of the Michigan appellate court's decision in *People v. Hegedus*,[9] that the fears expressed by Respondents in the court below were in imminent danger of becoming a reality, prior to the Illinois supreme court's decision.

Michigan is a state *with* an approved OSHA plan.[10] Nevertheless, the Michigan appellate court forbade the prosecution of the defendant for involuntary manslaughter on grounds of federal pre-emption, because:

> Although MIOSHA is a federally approved state plan and contains criminal penalties in excess of OSHA, the prosecution here is not under MIOSHA. Instead, the prosecution is attempting to bring general criminal charges against defendant. This attempt to

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[9] 169 Mich. App. 62, 425 N.W. 2d 729 (Mich. App. 1988).

[10] Mich. Stat. Ann. §17.50(i) *et seq.*

> circumvent the penalties in MIOSHA is also an attempt to assert jurisdiction over a federally covered occupational safety and health issue other than through an approved state plan.[11]

Fortunately for criminal justice, the Michigan Supreme Court has accepted this case for review,[12] and since the appellate court relied heavily upon the since reversed decision in the case below, the final resolution of this case may yet be different.

In sum, most of the decisions cited by Petitioners are distinguishable, and consequently not of the type to create a clear difference of opinion and consequent irreconcilable split of authority between the states. Moreover, no state high court, save that of Illinois in the case below, has yet passed on the issue of prosecutions of employers, such as that at bar, which are based on criminal laws of general application.

Respondent submits that given time, these issues will be resolved by the various states in a consistent, and constitutional manner.

Accordingly, for all or any of the foregoing reasons, Respondent respectfully requests that certiorari be denied.

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[11] *People v. Hegedus*, 169 Mich. App. 62, 425 N.W. 2d 729 at 731 (Mich. App. 1988). However, see the dissent of Danhoff, C.J., 425 N.W. 2d at 732.

[12] 429 N.W. 2d 593.

III.

SINCE FULLY ONE-HALF OF THE CHARGES MAY NOT EVEN BE SUBJECT TO THE PREEMPTION ARGUMENT, A GRANT OF CERTIORARI AT THIS TIME WOULD BE PREMATURE.

It is not apparent from the record on appeal in the case below whether all of the substances alleged to have been inhaled by the multiple victims in this case are substances for which OSHA standards are in effect, and it is open to question how many, if any, of those substances are specifically covered by standards regulating skin absorption, which means that fully one-half, or even more than one-half of the charges in the instant prosecution may not be specifically mentioned by OSHA "standards" at all.

This lack of clarity is due, in part, to the early stage at which these charges were dismissed.

It is respectfully submitted that further factual proceedings are necessary to clarify this, and the other issues before this Court before this case becomes one that is suitable for review on certiorari.

Accordingly, Respondent respectfully requests that for all or any of the foregoing reasons, certiorari be denied.

IV.

THE ISSUE OF WHETHER THE STATES MAY PROSECUTE CRIMES OCCURRING IN THE WORKPLACE, IN THE EXERCISE OF THEIR HISTORIC POLICE POWERS, OR WHETHER THE OCCUPATIONAL SAFETY AND HEALTH ACT, AN ACT PRIMARILY CONCERNED WITH THE PROMOTION OF WORKER SAFETY, PREEMPTS SUCH PROSECUTIONS, IS NOT A CLOSE QUESTION, AND WAS CORRECTLY RESOLVED AGAINST SUCH PREEMPTION BY THE SUPREME COURT OF ILLINOIS.

The entire argument of Petitioners is based upon several incorrect premises. Once these premises are examined closely and seen to be incorrect, the entire preemption argument in this case may be seen for what it really is: a hyper-technical and confused misapplication or misreading of the Occupational Safety and Health Act ("OSHA", or the "OSH Act"), and the mistaken emphasis of some of its provisions at the expense of others.

Viewed in context, as it was by the Illinois supreme court, the OSH Act does not support Petitioners' preemption theory, and in fact, does not present a question sufficiently close to merit a grant of certiorari by this Court.

A. Viewed In Context, The OSH Act Neither Expressly Nor Impliedly Preempts Prosecution By The States Of Crimes Occurring In The Workplace.

The underlying prosecution involves Indictments and Informations against the Chicago Magnet Wire Corporation, and five of its top executives, including Petitioner Frank Asta, for multiple counts of Aggravated Battery,[13] Reck-

[13] Ill. Rev. Stat., 1984, Ch. 38, §12-4(a), and (b)(12)(c) in conjunction with §12-3(a).

less Conduct,[14] and Conspiracy,[15] all of which are alleged to be in the violation of the generally applicable laws of the State of Illinois. Illinois is a State which has elected not to create its own state occupational health and safety administration, having withdrawn a previously submitted safety and health plan from consideration by the Secretary of Labor. The statutes under which Petitioners are charged do not, by their terms, purport to regulate health and safety issues, or the work environment, but rather, are criminal statutes of general application, applicable to all persons, and to all classes of persons, in the State of Illinois.

The OSH Act contains an extensive and explicit statement of the Congressional purpose behind its creation.[16] Although Petitioners seek to sprinkle their argument with references to legislative "history," and the statements of certain Congressmen, resort to such devices are neither necessary nor desirable where, as here, the congressional intent is clear from the face of the legislation itself. As this Court noted recently in another case, Congressional intent is "best determined by the statutory language (Congress) chooses. . . . (and) (C)ongressional silence, no matter how 'clanging', cannot override the words of the statute." *Sedima S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 495 n. 13, 105 S.Ct. 3275, 3285 n.13, 87 L. Ed. 2d 346, 358 n.13 (1985).

It is by now well established that the principal congressional purpose behind the OSH Act was the provision to the workers of America of "safe and healthful working

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[14] Ill. Rev. Stat., 1984, Ch. 38, §12-5(a).

[15] Ill. Rev. Stat., 1984, Ch. 38, §8-2.

[16] 29 U.S.C. §651(b).

conditions" and the preservation of our precious "human resources." See, 29 U.S.C. §651(b) and, *Taylor Diving and Salvage Co., Inc. v. United States Department of Labor*, 599 F.2d 622 (5th Cir. 1979); *Anning-Johnson Co. v. O.S.H.R.C.*, 516 F.2d 1081 (7th Cir. 1975); *RMI Co. v. Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979); *American Smelting and Refining Co. v. O.S.H.R.C.*, 501 F.2d 504 (8th Cir. 1974).

The structure of the OSH Act clearly indicates that Congress intended to accomplish these objectives by inviting the active participation of the States, and by setting certain *minimum standards* below which no employer could fall. To assure the accomplishment of these objectives, Congress required that all state plans designed to regulate health and safety in the workplace be approved by the Secretary of Labor. See, 29 U.S.C. §§651(b)(3), and (11), 667(b), 667(c)(2); and compare *American Federation of Labor and Congress of Industrial Organizations, Industrial Union Dept. v. Marshall*, 570 F.2d 1030 (D.C. Cir. 1978).

Petitioners have taken this simple, straightforward approach to worker safety and, with the addition of many sources not found in the statute, have sought to create a subtle, but significant change. Implicit in Petitioners' argument is the assumption that the creation of the OSH Act was intended to create a mandatory *uniform* national standard, rather than a mandatory *minimum* national standard for workplace safety. (See, Petition at pp. 10, 16-17) This is the first, the most subtle, and one of the more dangerous misassumptions indulged in by the Petitioners, and its exposure and refutation is fatal to their argument.

It is submitted that the Supreme Court of Illinois correctly held that "the purpose underlying section 18 was to ensure that OSHA would create a nationwide floor of effective safety and health standards and provide for the enforcement of those standards." (Citing *United Airlines, Inc. v. Occupational Safety & Health Appeals Board*, 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982)) (Opinion, Petition at p. 10a).

A contrary construction, particularly the more expansive one implicitly advocated by Petitioners, squares with neither the structure nor the provisions of the OSH Act. For example, the very provision which mandates review of submitted plans by the Secretary of Labor anticipates differences between them.[17] So does the provision encouraging the several States to assume full responsibility for their own safety and health laws within the context of their own individualized needs,[18] and the broad "savings clause" leaving intact an employers' liabilities and his responsibilities and duties to employees under *any law*.[19] The Illinois supreme court's interpretation of OSHA's basic structure and purpose is also consistent with the opinions of other courts which have approached this issue. Compare, *American Federation of Labor and Congress of Industrial Organizations, Industrial Union Dept. v. Marshall*, 570 F.2d 1030, 1042-1043 (D.C. Cir. 1978) (Concurring Opinion).

This distinction between mandatory *minimum* standards and mandatory *uniform* standards is an important one, because only under the latter can Petitioners hope to

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[17] 29 U.S.C. §667(c)(2).

[18] 29 U.S.C. §651(11).

[19] 29 U.S.C. §653(b)(4).

justify the argument that "(r)egardless of whether such *ad hoc* state standards are more 'strict' or more 'lenient,' application of a different standard to conduct and conditions in compliance with OSHA standards conflicts with Congress' objective of creating uniform and balanced workplace safety standards." (Petition at p. 16) (emphasis original)[20] Since the criterion established by Congress is "mandatory minimum," not "mandatory uniform" many

[20] Petitioners do not explain either here, or at any other place in their Petition, exactly how the charges in the instant case actually conflict with any existing OSHA standard. Petitioners then compound their error in interpreting OSHA by indulging in gross speculation about "local standards" being "established on a subjective and post-hoc basis", which will result in the establishment of an entire "secondary" level of standards, where "local authorities will simply decide, without guidance, whether to deem a particular workplace environment 'safe'—regardless of what standards the federal government, under OSHA, has established to regulate that environment." (Petition at p. 17) "Under the decision below", Petitioners prognosticate, "local prosecutors will have the discretion to use imprecise judgment as to workplace safety to indict an employer or even, in extreme cases, for purposes of political harassment." (Petition p. 18) This lop-sided and irresponsible view of federalism is not only presumptuous and completely without support in the record of the instant case, but it also ignores the following facts: (1) If Congress had believed Petitioners groundless fears to be valid, it could have expressly preempted such prosecutions and would not additionally have invited the States to create and enforce their own health and safety plans; (2) An exclusively federal approach is not the only answer, nor are federal agencies inherently any more energetic, expert or honest than their State counterparts. Some of the fears expressed by Petitioners have allegedly already become realities in the area of criminal prosecution under federal OSHA (See, Report of House Committee on Government Operations, "Getting Away With Murder In The Workplace: OSHA's Nonuse of Criminal Penalties For Safety Violations," H.R. Rep. No. 1051, 100th Cong. 2nd Sess. 9 [1988]); (3) the element of scienter in a criminal case would be, in the practical sense, impossible to prove if OSHA standards were complied with; and (4) OSHA has no comparable criminal penalties.

of the policy arguments advanced by Petitioners are invalid.

Even more importantly, the prosecution of criminal offenses under state criminal laws of general application cannot be preempted by OSHA because such prosecutions do not equate with the enforcement of health and safety "standards", as the term "standard" is defined in the OSH Act.[21]

This Court has held that the analysis to discover whether a state law is to be preempted by federal legislation consists of two major prongs. The first of the two prongs consists of an analysis of the federal statute itself to determine whether Congress has used language which would constitute an "express" preemption of the state statute in question. See, *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1722, 75 L.Ed. 2d 752, 765 (1983). If no express preemption is found, a state law may still be held to have been impliedly preempted if preemption was intended by Congress. *Fidelity Federal Savings and Loan Assn. v. De La Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed. 2d 664, 674-675 (1982). Preemption may be implied in several ways. First, preemption may be inferred where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L. Ed. 2d 714, 721, (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947). Sec-

[21] 29 U.S.C. §652(8).

ond, preemption may be inferred where " '(t)he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Fidelity Federal Savings and Loan v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed 2d 664, 675 (1982), quoting *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed 1447, 1459 (1947). Third, preemption may be inferred where the regulated field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

"Where, (however) the field which Congress is said to have preempted has been traditionally occupied by the States . . . 'we start with the assumption that the historic powers of the States were not to be superceded by the Federal Act unless (pre-emption) was the clear and manifest purpose of Congress.' " *Jones v. Rath Packing Company*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L. Ed. 2d 604, 614 (1977).

The power to prosecute crimes is one which has rested traditionally with the States. See, *Knapp v. Schweitzer*, 357 U.S. 371, 375, 78 S.Ct. 1302, 1305, 2 L.Ed 2d 1393 (1958); *Patterson v. New York*, 432 U.S. 197, 201, 97 S.Ct. 2319, 2322, 53 L. Ed. 2d 281, 287 (1977). In the State of Illinois, the enactment of criminal statutes, the enforcement of the criminal law, and the sentencing of convicted criminals are an exercise by the State of its traditional police power. See, *People v. Alejos*, 97 Ill. 2d 502, 455 N.E. 2d 48, 74 Ill. Dec. 18 (1983); *People v. Bradley*, 79

Ill. 2d 410, 417, 403 N.E. 2d 1029 (1979); *People v. Coleman*, 111 Ill. 2d 87, 488 N.E. 2d 1009, 1013-1014 (1986).

Where the state's police power is involved, courts are reluctant to find preemption unless the preemptive intent is "clearly indicated," *Maurer v. Hamilton*, 309 U.S. 598, 614, 60 S.Ct. 726, 734, 84 L.Ed. 969 (1940); "definitely expressed," *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79, 85, 59 S.Ct. 438, 441, 83 L.Ed. 500 (1959); "clear and manifest," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); and "unmistakably . . . ordained [by Congress.]" *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L. Ed. 2d 248, 257 (1963). Otherwise, there is a presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed. 2d 576, 595 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

(1) Congress Did Not Expressly Preempt State Criminal Prosecution Of Offenses Occurring In The Workplace.

The OSH Act contains no provision which expressly precludes all state-action in the workplace, nor one which precludes criminal prosecutions. To the contrary, it contains several provisions which militate against the idea of preemption. For example, Section 653(b)(4)[22] specifically leaves intact all laws relating to the rights, duties and liabilities of both employers and employees under *any* law with respect to injuries, diseases, or the death of employees arising out of, or in the course of employment. Section 667(a)[23] even permits the States to take jurisdic-

[22] 29 U.S.C. §653(b)(4).

[23] 29 U.S.C. §667(a).

tion directly over health and safety issues themselves where no OSHA Standards are in effect. Moreover, the complete lack of serious criminal penalties also evidences a lack of desire on the part of Congress to become involved in the area of criminal jurisprudence, and indicates that the primary thrust of the standard enforcement effort is to be through civil, rather than through criminal sanctions.[24] The legislative history of the OSH Act is not inconsistent with this philosophy.

The setting or enforcing of occupational safety and health "standards" pursuant to §667(b)[25] is not the same thing as punishing an injury to, or the death of, a worker where that injury or death is criminally motivated. Neither the criminal statutes in question, nor the charging documents in this case even mention occupational safety and health "standards." Accordingly, there can be no "express" preemption.

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[24] The only section of the OSH Act which contains a provision even remotely resembling the offenses with which Petitioners are charged is 29 U.S.C. §666(e), which provides misdemeanor sanctions for willful *standard* violations resulting in the death of an employee. No deaths are alleged in the instant case, and there is no attempt in the statute to punish substantive offenses, only violations of OSHA standards. Even so, from OSHA's passage in 1970, to February, 1988, only 42 cases were referred by OSHA for criminal prosecution. Only 14 of those cases were prosecuted, and only 10 of those resulted in criminal convictions. In the entire 18-year history of OSHA, up to February, 1988, no one had ever spent one day in jail for any criminal offense, despite the fact that during this period more than 100,000 American workers lost their lives because of unsafe working conditions. Report of House Committee on Government Operations, "Getting Away With Murder In The Workplace: OSHA's Nonuse Of Criminal Penalties For Safety Violations," H.R. Rep. No. 1051, 100th Congress, 2nd Session 9 (1988) (pp. 3-4).

[25] 29 U.S.C. §667(b).

For the foregoing reasons, therefore, Respondents urge that Certiorari be denied.

(2) Since The Primary Purpose Of Congress, When Enacting OSHA, Was The Promotion Of Safe And Healthful Working Conditions For The Workers Of America, Congress Could Not Have Intended To Accomplish Its Objective By Immunizing Those Few Unscrupulous Employers Who Knowingly Commit Crimes Against Those Workers, And The Doctrine Of Implied Preemption Is Therefore Inapplicable.

The theory which is the necessary underpinning of Petitioners' implied preemption arguments, is based upon a fundamentally faulty premise, to-wit: That the criminal prosecution of certain unscrupulous employers, who knowingly, intentionally, or wilfully injure or kill their employees, equates with the enforcement of health and safety standards. Petitioners then add unnecessary complexity to the problem by speculating about the supposedly inconsistent results such prosecutions will have on the regulatory effort nationally, and by disingenuously implying that they (Petitioners) were in compliance with OSHA Standards and are thereby being unjustly prosecuted.[26]

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[26] Petitioners' assertion that they are being unjustly prosecuted is contained in their statement that. . . (I)t seems plain that Congress' intent to encourage employer cooperation will be thwarted if employers (*such as petitioners*) *who comply with OSH Act Standards* become subject to local prosecution. (emphasis supplied) (Petition at p. 18 and also see p. 21) This none too subtle argument is improper because Petitioners were dismissed prior to any factual hearing or trial in this case, and thus the question of whether the allegedly egregious conduct of Petitioners violated any OSHA standards was never heard. Because of the implication that the State of Illinois is engaging in this type of conduct, Respondent has attached, as Appendix "A" to this brief, the Statement

(Footnote continued on following page)

(Petition at p. 18) Petitioners then seek to further confuse the issue by misstating Respondents' position regarding the relevancy of testimony about OSHA standards.[27]

Of course, there was no allegation in the pleadings below that Petitioners had violated OSHA standards, because this case was not brought to enforce OSHA standards.[28] Instead, as the Illinois supreme court held, this

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[26] *continued*

Of Facts, based upon the trial court record, which Respondent presented to the Supreme Court of Illinois. Because this Statement is based, in part, upon testimony before the Cook County Grand Jury, it is not submitted as having been established beyond a reasonable doubt. Rather, it is appended simply to rebut the assertions of Petitioners that they were in compliance with OSHA standards, and to illustrate, in graphic terms, the type of prosecution which is represented by the underlying case and some of the facts Respondent expects to prove if this case is allowed to be tried on its merits. The Illinois Court declined to grant Petitioners' Motion to Strike this testimony, thus leaving it as part of the Record on Appeal. (Opinion, Petition, p. 17a) Expositions of this and of other similar cases of workplace crimes may also be found in the following sources: *Getting Away With Murder: Federal OSHA Preemption Of State Criminal Prosecutions For Industrial Accidents*, 101 Harv. L. Rev. 535, 550 (1987); Warren, Rebecca, *The OSH Act and State Criminal Law: A Prosecutor's Brief*, Criminal Law Bulletin, May-June, 1989, Vol. 25 No. 3, Warren Gorham & Lamont, Inc., Boston, Mass. (pp. 234-256); and Report of House Committee on Government Operations, Getting Away With Murder In The Workplace: OSHA's Nonuse Of Criminal Penalties For Safety Violations, H.R. Rep. No. 1051, 100th Cong., 2nd Sess. 9 (1988).

[27] Petitioners erroneously characterize Respondents' position by stating that the Respondent successfully contended that "OSHA standards are simply irrelevant in this case." (Petition p. 17) This is not, nor has it ever been Respondents' position in this case. Rather, Respondents have taken the position that OSHA violations are *immaterial*, which is to say, they need not be alleged as a separate element of the state crime charged. Actually, as a practical matter, compliance or non-compliance may be highly relevant in determining the material element of *mens rea*.

[28] *Id.*

case was brought "to punish as a matter of retributive justice." (Opinion, Petition at p. 8a) To be sure, every state statute which touches at all upon an area where federal legislation is present has some incidental impact upon that area, but where that impact is neither direct, nor in conflict with the federal legislation, the incidental impact does not rise to the level of preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S.Ct. 615, 625, 78 L.Ed. 2d 443, 457 (1984); and compare, *Smith v. Western Electric Co.*, 643 S.W. 2d 10 (Mo. App., 1983).

In a number of ways, Congress has not only failed to indicate an intent to occupy the field of state criminal law, but has clearly indicated a contrary intent.

As already noted, the primary purpose of OSHA is the encouragement of improved working conditions, the promotion of the health and safety of workers, and the preservation of our precious human resources. (See, pps. 14-15, *supra.*)

Congress elected to accomplish these ends by enacting regulations and by imposing sanctions for the violations of those regulations. Moreover, even in the realm of regulation of the workplace, Congress did not intend to occupy *every* area. Thus, in the absence of a federal standard under 29 U.S.C. §655, even state regulatory laws are not preempted, since Congress did not intend to occupy the entire field of regulation. *Puffer's Hardware, Inc. v. Donovan*, 742 F. 2d 12, 16 (1st Cir. 1984); (and see also: 29 U.S.C. §667(a), which reserves to the state the right to assert its jurisdiction over *health and safety issues* for which no OSHA standards are in effect.)

Therefore, even in the area of direct regulation, Congress has indicated that it did not anticipate the complete preoccupation of the field by OSHA.

Petitioners' argument that Congress intended to occupy the "whole field" therefore is not even valid as it applies directly to health and safety issues themselves, and as this Court stated in *Hillsborough County v. Automated Medical Laboratories, Inc.*:

> Appellee's second argument for pre-emption of the whole field . . . is that an intent to pre-empt can be inferred from the dominant federal interest in this field. We are unpersuaded by this argument. Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of "importance" and hold that, for those at the top of the scale, federal regulation must be exclusive. 471 U.S. 707, 719, 105 S.Ct. 2371, 2378, 85 L.Ed. 2d 714, 725 (1985).

This is true with especial force in the instant area, where Congress has not only invited State participation and reserved regulatory authority to the States in the health and safety area itself,[29] but has explicitly stated its intention that all non-conflicting laws are to remain in effect,[30] and further, has failed to include provisions punishing substantive offenses, such as Murder, Aggravated Battery, and Reckless Conduct but instead has merely sought to punish, with misdemeanor penalties, *standard violations*.[31] In the instant matter, Petitioners have offered absolutely no solid indication that prosecutions such as this one will in any way obstruct or conflict with the congressional intention behind, or with the

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[29] 29 U.S.C. §667(a).

[30] 29 U.S.C. §653(b)(4).

[31] 29 U.S.C. §666(e).

enforcement of, the OSH Act. Instead, Petitioners engage in rank speculation and unsupported guesswork, using imaginary "worst case" scenarios about "what might possibly happen" in hypothetical situations. (See, generally, Petition at pp. 16-19, 21) Such hypotheticals do not have any valid relationship to the charges in the case at bar, and where, as here, there is no clearly established conflict between the enforcement of State law and the operation of the federal statute, this Court has repeatedly held that such conflicts out not be sought out. See, *Huron Portland Cement Co. v. City of Detroit, Michigan*, 362 U.S. 440, 446, 80 S.Ct. 813, 817-818, 4 L.Ed. 2d 852, 858-859 (1960); and *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3298-3299, 73 L.Ed. 2d 1042, 1053 (1982):

> . . . [P]re-emption should not be judged on the basis that the federal government has so completely occupied the field of safety, that state remedies are foreclosed, but on whether there is an *irreconcilable conflict* between federal and state standards, or whether the imposition of a state standard would frustrate the objectives of the federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, 104 S. Ct. 615, 626, 78 L. Ed. 2d 443, 458 (1984).

The principal faults of the Illinois appellate court in its opinion approving the preemption theory, an opinion which Petitioners' cite with approval, was its implicit acceptance of the theoretical and hypothetical conflicts raised by Petitioners and that Court's incorrect assignment of the burden of persuasion to the Respondent, rather than to Petitioners. (Appellate Opinion, Petition, pp. 19a, 23a,

24a)[32] Had that court not indulged in those fundamental errors in approach, its decision would have been different.

In fact, state prosecution of crimes in this area, under laws of general criminal application, can do nothing but give assistance to the Congressional purpose in enacting OSHA.

Stripped of its legalisms, Petitioners argument may be seen for what effects its adoption would portend; immunity for employers (including corporations) as a class, no matter how egregious, no matter how repugnant their abuse of their employees. How tragically ironic if an act, the primary purpose of which is the benefit of American workers, were twisted into a shield for unscrupulous, uncaring companies and executives to escape responsibility for acts which, if committed by any other person, would

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[32] *People v. Chicago Magnet Wire Corp.*, 157 Ill. App. 3d 797, 510 N.E.2d 1173, 110 Ill. Dec. 142 (1st Dist. 1987). This opinion, like that of the Supreme Court of Illinois in the same case, (*People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 534 N.E. 2d 962, 128 Ill.Dec. 517 (1989), restyled by Petitioners as *Frank Asta et al. v. State of Illinois*, in this Court) is contained in the appendix to the Petition For Certiorari filed by Petitioners. Page citations to both opinions are to the page(s) of that Appendix. The opinion of the Illinois appellate court, as correctly noted by the Wisconsin Court of Appeals, which declined to follow it, inappropriately assumed the existence of conflicts, which were neither established by Petitioners nor irreconcilable in nature and: "The Illinois (Appellate) Court never acknowledged or discussed the rule that an Act of Congress is presumed not to preempt state law, or that the burden of showing preemption is upon the person claiming it. Indeed, the court appears to have proceeded on the assumption that the State had the burden to show lack of preemption." *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 425 N.W. 2d 21 (Wis. App. 1988). *Cornellier* was cited with approval by the Illinois supreme court in its reversal of the Illinois appellate court's *Magnet Wire* opinion. (See, Opinion, Petition p. 15a)

be punished as crimes. This cannot have been what Congress intended and there can be, therefore, no implied preemption in this case.

Seen in this way, the question is not a close one, and Respondent urges that certiorari accordingly be denied.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

STATEMENT OF FACTS FROM THE STATE'S BRIEF BEFORE THE SUPREME COURT OF ILLINOIS

STATEMENT OF FACTS [1]

Chicago Magnet Wire Corporation (hereinafter "CMW") is a subsidiary or held company of North American Phillips. The principal business done at CMW is the coating of wire with various substances and chemical compounds. The individuals charged are officers or high managerial agents of CMW. At all times pertinent to the charges, Anthony Jordan was President of CMW, (R. 1006) Kevin Keane was Plant Manager, (R. 1006-1007) Allan Simon was Plant Engineer, (R. 1007) Frank Asta was Maintenance Foreman, (R. 1007) and Gerald Colby occupied a number of positions, including those in control of engineering, maintenance, and quality control. (R. 1007)

The physical problems at CMW apparently began shortly after the plant's capacity was expanded in 1979-1980. At that time CMW installed sixteen new ovens and began to speed up its production. (R. 900) At one point production was up 700% over capacity, and the business was very profitable. (R. 1056) After this modification, plant conditions appear to have worsened.

The plant air quality was very poor. It exuded an offensive odor, and was very cloudy and smokey, so much

[1] In their Response to the People's Petition For Leave To Appeal (hereinafter "Response" and "Petition", respectively) Defendants criticized the People for allegedly failing to deal with the charged conduct. (Response p. 3) Although the People submit that this criticism is unjustified, due to the fact that this case has not yet been tried, this statement of facts deals with the conduct the conduct underlying the charges as seemingly invited by Defendants. The testimony cited is some of that taken before the Cook County Grand Jury, and is part of the Record On Appeal. Needless to say, the "facts" cited are only alleged at this point, since the People have not permitted to go to trial in this case, and they are not all inclusive. This Statement of Facts will, however, give this Honorable Court a good sample of what the People's evidence at trial would show.

so that vision was substantially impaired. (R. 1010) The plant was also extremely hot, the floor temperature ranging around 90 degrees in the winter and 120 degrees in the summer. (R. 976) On the catwalks, where workers were required to go, the situation was much worse. There temperatures climbed as high as 250 degrees to 300 degrees, (R. 977) well above the boiling point of water.

The plant contained eighty-six ovens which operated at between 800 degrees and 1,000 degrees (R. 978-979) Additionally, the plant contained extruder ovens which were used to coat the wire with polyvinyl chloride, and which overheated and smoked incessantly, (R. 979, 1047) and procedyn ovens which burned off the polyvinyl chloride and gave off a dense smoke. (R. 979)

At one point, every machine in the plant was unguarded, and when wire strands would break, the spools of wire would keep spinning, flinging wire fragments into employees' faces, heads, necks and chests. (R. 1068) The machines also sprayed a fine oil mist which covered everything and hung in festoons, making the work area very slippery and hazardous. (R. 1046) Aluminum and copper dust coated the floors, (R. 1046) and in this close-quartered atmosphere, pools of spent enamel were "all over the place." (R. 1032)

Alarms in the ovens were by-passed and Defendant Jordan forbade their repair since to do so would have decreased production. (R. 1020-1021) In some cases, such as that with one of the procedyn ovens, a machine was operated without all of its parts, even though the parts needed to repair it were lying right next to the machine, because Defendants did not want to stop production long enough to fix the oven. (R. 1035)

Despite the frequent fires at the CMW plant, flammable materials were stored on the catwalks to feed into the system, (R. 1030-1031) there were gas leaks, and the plant's electrical system was defective. (R. 1053)

Until 1982, the plant averaged between 1,000 and 1,100 employee injuries out of a total of 225 factory employees. (R. 1008)

Gary Olson, who was Safety Director at CMW between 1979-1983 (R. 1006) described CMW as a "sham" and a "travesty", (R. 1068) where most of the one hundred or so employees who were disabled by occupational diseases were fired, (R. 1043) where employees regularly "dropped over" due to the heat and fumes, (R. 1046), and where there was a constant flow of employees between CMW and the hospital. (R. 1046) Having ambulances report to CMW, Olson stated, "was not an unusual circumstance." (R. 1046)

Typical of the plight of the employees was that of Danny Vaughn, a CMW employee from 1979, until March 30, 1983, who worked as a "late man" in the maintenance department. (R. 975) Vaughn's duties at the plant included keeping the enamel floor machinery running. (R. 975) He described the factory as smokey and hazy. Breathing was difficult at the top of the plant, and his eyes watered, his nose ran, he had dizzy spells and nausea. (R. 976) Hot enamel frequently burned his skin, and resulted in scarring. (R. 976)[2]

Mr. Vaughn was required to work on the catwalks every night, (R. 980-981) where the temperature sometimes reached 300 degrees. (R. 977) While there, he had to clean the sheaves, shutters, and hoods with trichloroethylene, utilizing only cloth gloves, a paint brush and paper towels. (R. 981, 984) The trichloroethylene soaked through his gloves everytime, and would vaporize when it hit one of the hot objects, giving off a vapor which burned his eyes, made his nose run, and caused dizziness.

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[2] Of course, not everyone found the enamel burns painful. One employee, Reginald Bryson, got some hot enamel into his shoes, was in an extreme amount of pain and was trying to get his shoes off, while Defendant Kevin Keane, who was watching this incident, laughed at him. (R. 1004)

(R. 982)[3] Mr. Vaughn was not provided with a respirator (R. 983), rubber gloves, (R. 985) or aprons. In fact, the only safety equipment he was provided were shoes and glasses, and the glasses were not vapor proof. (R. 987) Most of the employees who worked cleaning up the enamel spills were not provided any protective equipment either, (R. 983) although they were compelled to clean up the enamel spills with a 50/50 mixture of xylol and Cresylic Acid, which they poured over mops and mopped the floor with. (R. 983)[4]

Vaughn testified that he was on the catwalks himself cleaning the sheaves, shutters and hoods three times per night, (R. 985) and sometimes was on the catwalks up to thirty times per night for other reasons. (R. 981) He stated that breathing on the catwalks was very difficult (R. 12) and that his face was only about twelve inches from those spots where the trichloroethylene compound he was using to do the cleaning was being turned into vapor. (R. 982) During Vaughn's four years at CMW, no fresh air was pumped into the plant, (R. 989) the hoods over the ovens would not pull the smoke away, (R. 989) and only some of the applicator machines had doors on them to keep the smoke inside the ovens. (R. 991)

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[3] Trichloroethylene is a fast soluble material much like ether, which can be absorbed through the skin or inhaled. (R. 1063) It is a central nervous system depressant and lung irritant. It can cause brain damage, kidney and liver problems, and has been associated with cardiovascular problems. When it comes into contact with high heat or hot metal it vaporizes, creating by-products which include phosgene gas, chloride gas, and hydrochloride acid. (R. 1063)

[4] Xylene, which was used at the plant, is a solution solvent absorbed through the skin and lungs. (R. 1063) It is very toxic, affects the eyes and mucus membranes, and can cause narcosis. (R. 1064) Cresol produces central nervous system disorders, chronic stomach and intestinal pain, and damage to the liver, kidneys and lungs. (R. 1064)

Mr. Vaughn, who became concerned about his trouble breathing, asked Defendant Frank Asta whether the chemicals in the plant were harmful, but was told that they would not hurt his breathing. (R. 993)

Nevertheless, on March 15, 1983, while attempting to repair one of the procedyn ovens which did not have all of its parts (R. 1035) and was exuding polyvinyl chloride, (R. 994) Danny Vaughn, who still had been provided no respirator, (R. 994) began to feel ill. After completing the job, and upon being called to do another, he became unsteady, saw "white dots" before his eyes, and noticed that his throat was sore and his eyes watering. (R. 994) He attempted to shake the condition by going outside to get some fresh air, but that only seemed to aggravate his symptoms. (R. 994-995) He decided to go to the hospital, but was informed that a taxicab would take at least 45 minutes, so he eventually drove himself there, despite the numbness in his legs. (R. 995-997)

After returning to work, Mr. Vaughn again became ill on March 30, 1983, while cleaning the shutters. He could not breathe. (R. 995) Again he went to the hospital, where, after undergoing some tests, it was determined that his lungs were filled with fluid. (R. 996) Danny Vaughn has not been able to work since that time. (R. 996) When he began working for Chicago Magnet Wire, Danny Vaughn was in perfect health. (R. 997) Now he has liver damage, bladder and respiratory problems, [neurosis] (sic?) of the liver, severe headaches and hepatitis, and is completely unable to work. (R. 996-997)

On at least one occasion, Traveler's Insurance Company, CMW Workers' Compensation carrier, was requested to do some testing. (R. 1011) When Defendant Jordan discovered that one of CMW's female employees had written to Traveler's he told CMW's Safety Director to "cut her tits off", and make sure she never was able to work at CMW again. (R. 1011) Jordan, in fact, maintained that there was nothing wrong with the plant's air, (R. 1012) and that masks would never be used because the air was

fine, (R. 1027) although he did repeatedly refuse to permit Traveler's permission to test. (R. 1012-1013) Moreover, Jordan refused to release to Traveler's results of some tests allegedly performed by Leon Kirschner, an industrial hygiene consultant. (R. 1012-1013) CMW's Safety Director never saw Kirschner perform such tests. (R. 1013) In fact, no testing was done at all until pressure forced one in June, 1983. (R. 1013) Evidently, the pressure came from the parent company and, typically, was caused by a concern over excessively high insurance premiums. (R. 1016-1019)

When Traveler's was finally permitted to do some testing, their conclusions were that the CMW plant was defective by reason of excessive heat, excessive sound, air pollution, and poor management. (R. 1019)

Defendants Jordan and Colby told employees that there was nothing in the plant that would hurt them, (R. 1021) and Jordan did not want employees to wear masks because if they did, the employees might think there was something wrong with the air. (R. 1027)[5] Once, when the manager of engineering himself passed out in the plant and injured his head on one of the ovens, Defendants Keane's suggestion to him was to "stay away from the ovens." (R. 1022)

Olson knew there was something very wrong with the air, and argued with Defendants Jordan and Simon about the problem. (R. 1023) He quoted OSHA standards to all of the Defendants, (R. 1023-1024) but they all "felt that we should get away with what we could get away with until we got caught and suffer the consequences however minor they would be." (R. 1024) Additionally, Defendant Keane amplified this position a bit, and stated that he didn't "give a fuck about the law" as it pertained to respirators. (R. 1027)

[5] Of course, the defendants occupied an air conditioned office.

When Olson met with Defendants Jordan, Keane and Colby to discuss the large number of workers who were becoming ill, Jordan ordered him to "stay the hell away from it" and to do what he was told or be fired. (R. 1028-1029) When Olson finally succeeded in getting a few respirators, he was at first not permitted to give them out, and then was precluded by Jordan from replacing the filters in those few respirators which he did manage to obtain. (R. 1019-1020)

When an air meter was finally obtained in the Spring of 1983, it "went off" in virtually every part of the CMW plant. (R. 1036)

Although OSHA did come in response to a complaint in July, 1983, the plant was not going through its normal operation because someone had been tipped off that they were coming. (R. 1040)

When doctors called the plant for information necessary to help employees who were their patients, they were not given the requested information. (R. 1042) Olson knew personally of one employee who was medically unable to work because of breathing problems incurred at CMW, whom Defendant Jordan fired. (R. 1043) Workers were berated into returning from sick leave. (R. 1043) Olson also knew of a guard who was fired because he made the mistake of giving a doctor, whose worker-patient was in the emergency room of a hospital with severe respiratory distress, some necessary treatment information concerning a chemical used at the plant. (R. 1043-1044)

Gloves were withheld from gas inspectors so that they could not ascend hot ladders to check for leaks, (R. 1041) and workers fired because they were too ill to work were denied worker's or unemployment benefits. (R. 1043) Despite explosion hazards, and constant fires, no evaluation plan was put into practice because to do so would mean a decrease in production. (R. 1033)

Doctor Mark Round, who examined or was familiar with the cases of all the victims, testified that the aluminum

dust present in the plant, in conjunction with the heat and trichloroethylene caused moderate to severe brain damage, and has been associated with Altzheimer's disease. Moreover, Dr. Round stated, polyvinyl chloride causes nervous disturbances and liver disorders, (R. 1068) copper dust ulcerates the lungs and causes skin and hair discoloration, (R. 1067) and methyl ethyl ketone, another solvent used in the plant, causes eye irritation, and narcosis. (R. 1069-1070) Additional chemicals present at CMW were isopropanol, urethane, methyl pyrrolidon, methyl pentane, ketone and naptha.

Tests for toxic chemicals were positive for all of the victims, and at least half of those chemicals used at the plant showed up in the typical worker's case. (R. 1073-1075) The victims suffered from conditions and illnesses including toxic dementia, solvent narcosis, toxic bronchitis, proteins and blood in the urine, impotence, painful burning and frequent urination, toxic hepatitis, and numbness in the extremities. (R. 1076-1077) It was Dr. Round's expert opinion that the conditions of the victims were caused by their exposure to the chemicals used at CMW. (R. 1077)